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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Concluding observations on the fifth periodic report of China with respect to Hong Kong, China*

1. The Committee against Torture considered the fifth periodic report of Hong Kong, China (CAT/C/CHN-HKG/5) at its 1368th and 1371st meetings (see CAT/C/SR.1368 and 1371), held on 17 and 18 November 2015, and adopted the present concluding observations at its 1392 and 1393 meetings, held on 3 December 2015.

A. Introduction

2. The Committee welcomes the submission of the report of Hong Kong, China, as part of the fifth periodic report of China. It also welcomes the written replies to the list of issues (CAT/C/CHN-HKG/Q/5/Add.1) and the supplementary information provided after the consideration of the report.

3. The Committee appreciates the quality of its dialogue with the multisectoral delegation and the responses provided orally to the questions and concerns raised during the consideration of the report.

B. Positive aspects

4. The Committee welcomes the following legislative measures in areas of relevance to the Convention:

(a) The adoption of the Immigration (Amendment) Ordinance 2012 (Ord. No. 23 of 2012), which establishes a statutory process to request the non-refoulement protection of article 3 of the Convention;

(b) The 2008 and 2010 amendments to the Domestic Violence Ordinance, extending its protection to former spouses, former cohabiting couples, same-sex cohabitants and former same-sex cohabitants.

* Adopted by the Committee at its fifty-sixth session (9 November-9 December 2015).

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5. The Committee also welcomes the initiatives of Hong Kong, China to adopt measures or to amend policies and administrative measures to give effect to the Convention, including:

(a) The gradual introduction since 2012 of low-radiation X-ray body scanners in reception centres to replace body cavity searches;

(b) The 2014 extension by administrative means (the so-called "unified screening mechanism") of the process to request non-refoulement protection to claims (a) on the grounds of torture, cruel, inhuman or degrading treatment or punishment, under article 3 of the Hong Kong Bill of Rights; and (b) on the grounds of "persecution", with reference to the non-refoulement principle, under article 33 of the 1951 Convention relating to the Status of Refugees;

(c) The organization of specific training programmes for health professionals and immigration officers on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol);

(d) The 2013 amendment to the prosecution code, which provides guidelines for prosecutors to handle cases of forced labour;

(e) The set-up of an interdepartmental working group on gender recognition, to consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in Hong Kong, China.

C. Principal subjects of concern and recommendations

Pending follow-up issues from the previous reporting cycle

6. The Committee notes with appreciation the compliance of Hong Kong, China with the follow-up procedure. While appreciating some positive legislative (see para. 4 (a) above) and administrative (see para. 5 (b) above) measures, the Committee notes with concern that, according to the data provided by Hong Kong, China, from December 2009 to May 2015, only 32 non-refoulement claims out of 6,628 were considered substantiated, which is indicative of a distinctly high threshold for granting protection. The Committee also takes into account reports on the difficulties claimants face in accessing the decisions of the Torture Claims Appeal Board, which are not published, thereby impeding the effective preparation of their cases. Furthermore, the Committee is concerned at the plans to fast-track the system to address the large backlog of pending applications (of which there are currently more than 10,000), since such a measure may negatively impact the fairness and thoroughness of the screening procedure. It notes with concern the position of Hong Kong, China that the extension to it of the 1951 Convention relating to the Status of Refugees "would subject its immigration regime to abuses and thus undermine public interest", which prima facie portrays all claimants in need of protection as abusers of the system. In that regard, the Committee is concerned that claims of non-refoulement are not entertained unless the person concerned has overstayed his or her visa and becomes officially "illegal", forcing potential victims of torture to wait until that period expires in order to register with the unified screening mechanism and gain access to rehabilitation and humanitarian assistance. The Committee also notes with concern that, by failing to give refugee status to unified screening mechanism claimants, it denies them access to legal work, thereby compelling them to live on in-kind assistance below the poverty line for long periods of time (art. 3).

7. **The Committee calls on Hong Kong, China to review the non-refoulement claim screening procedure in order to ensure that persons in need of international**

protection, including those fleeing indiscriminate violence, are fully protected against refoulement. In particular, Hong Kong, China should:

(a) **Ensure unhindered access to the unified screening mechanism to all individuals wishing to claim protection, irrespective of their immigration status;**

(b) **Enhance the fairness and transparency of the screening process by, inter alia, ensuring that non-refoulement claims are thoroughly and individually examined; allowing sufficient time for claimants to fully indicate the reasons for their application and to obtain and present crucial evidence, such as their own medical expert evidence; and publishing redacted versions of the decisions of the Torture Claims Appeal Board;**

(c) **Develop mechanisms for the early identification of victims of torture, their priority access to the unified screening mechanism and their immediate access to redress;**

(d) **Grant an alternative immigration status to refugees and substantiated unified screening mechanism claimants that would allow them to remain legally in Hong Kong, China until the end of the process and facilitate their access to legal work in order to avoid destitution and degrading treatment;**

(e) **Consider extending to it the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.**

8. Recalling its previous recommendation (see CAT/C/HKG/CO/4, para. 12), the Committee remains concerned that investigations of police complaints continue to be conducted by the Complaints Against Police Office, which is a separate division of the police force. It is also concerned that the Independent Police Complaints Council remains an advisory and oversight body of the investigations of the Complaints Office, with no power to conduct investigations on its own. The Committee regrets the failure of Hong Kong, China to provide complete statistical data with regard to the number of complaints of torture or ill-treatment (including police abuse) received by the Complaints Office in the reporting period, as well as on the outcome of those complaints. It also remains concerned at the lack of an independent and effective mechanism for lodging complaints without fear of reprisals within the detention facilities under the police department, the immigration department or the correctional services department (arts. 12 and 13).

9. **The Committee reiterates its previous recommendation that Hong Kong, China consider establishing a fully independent mechanism mandated to receive and investigate complaints against all officials and ensure that there is no institutional or hierarchical relationship between the investigators of that particular body and the suspected perpetrators of the acts that form the basis of a complaint. The Committee also urges Hong Kong, China to:**

(a) **Ensure that the Prosecutor's office is duly informed of all the allegations of torture or ill-treatment received by that particular body and launch investigations on its own initiative whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed;**

(b) **Guarantee that alleged perpetrators of torture and ill-treatment are immediately suspended from duty for the duration of the investigation, subject to the observance of the principle of presumption of innocence;**

(c) **Establish confidential complaints mechanisms in all places of detention to facilitate the submission of complaints by victims of torture and ill-treatment to the investigating body, including for obtaining medical evidence in support of their**

allegations, and to ensure in practice that complainants are protected against any reprisals as a consequence of their complaint or any evidence given;

(d) **Ensure that the suspected perpetrators are duly prosecuted, tried and, if found guilty, punished in a manner that is commensurate with the gravity of their acts.**

Definition of torture

10. Notwithstanding the position of Hong Kong, China that the word "includes" in section 2 (1) of the Crimes (Torture) Ordinance makes it clear that a person not holding an office described in the schedule may still be a "public official", the Committee remains concerned that the absence of a more inclusive definition of the term "public official" could, in practice, prevent the prosecution of other officials not explicitly mentioned in such schedule. Furthermore, the Committee notes with concern that Hong Kong, China has taken no action to abolish the defence of "lawful authority, justification or excuse" of the illicit conduct under the law of Hong Kong, China or the law of the place where it is inflicted, contained in section 3 (4) of the same Ordinance. In that respect, the Committee reiterates that the prohibition against torture is absolute and non-derogable and does not authorize any possible defence. It also considers that the defence of "lawful authority, justification or excuse" is broader in scope than the second sentence of article 1 (1) of the Convention, and could thus lead to abusive interpretations contrary to the Convention (arts. 1 and 4).

11. **The Committee reiterates its previous recommendations that Hong Kong, China should amend its legislation to include a definition of torture that is in full conformity with the Convention and covers all the elements contained in article 1. To that effect, Hong Kong, China should reconsider:**

(a) **Adopting a more inclusive definition of the term "public official" in order to ensure that all public officials or any other person acting in an official capacity can be prosecuted for acts of torture;**

(b) **Abolishing the defence contained in section 3 (4) of the Crimes (Torture) Ordinance. The Committee draws the attention of Hong Kong, China to its general comment No. 2 (2007), on the implementation of article 2 of the Convention, in which it states, inter alia, that the prohibition against torture is absolute and non-derogable and no exceptional circumstances whatsoever may be invoked to justify acts of torture (para. 5). It also reminds that serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity (para. 9).**

Detention and fundamental legal safeguards

12. The Committee is concerned at consistent reports of massive detentions of persons in the context of demonstrations and the alleged restrictions to the detainees' legal safeguards. In that regard, the Committee takes note of the information provided by Hong Kong, China that 511 persons were arrested in connection with an assembly that followed an annual march on 1 July 2014, and is concerned at information that only 39 lawyers met with the arrestees during their detention (arts. 2 and 16).

13. **Hong Kong, China should ensure that all detainees are afforded in practice all fundamental legal safeguards from the very outset of their deprivation of liberty, including the right to be assisted by a lawyer without delay; to have immediate access to examination and treatment by independent doctors, without conditioning such access on the permission of officials; to be informed of the reasons for arrest and the nature of any charges against them; to be registered at the place of detention; to inform promptly a close relative or a third party concerning their arrest; and to be**

brought before a judge without delay. Hong Kong, China should adopt effective measures to ensure compliance with its legally prescribed procedures of arrest and monitor the compliance of public officials with the legal safeguards. It should also ensure that those who are suspected of not complying with the legal guarantees or of arresting persons without justifiable reason are investigated and, if found guilty, duly sanctioned.

Excessive use of force when containing demonstrations

14. The Committee is concerned at consistent reports of excessive use of tear gas, batons and sprays against protesters during the 79-day protest of the so-called "umbrella" or "occupy" movement in 2014. It is also concerned at consistent reports that police resorted to violence against more than 1300 people, and around 500 were subsequently admitted to hospitals. The Committee expresses concern at allegations of threats of sexual violence and assaults by the police to demonstrators while they were following the instructions of leaving the scene. Furthermore, it notes with concern of various instances of violence perpetrated by counter-demonstrators. As regards the complaints received by the Complaints Against Police Office during the protest and their investigation, the Committee is concerned that, out of 527 complaints made by a total of 2078 complainants, only 172 complaints were considered "reportable". Of those 172 reportable complaints, the Complaints Office submitted investigation reports to the Independent Police Complaints Council for 151 cases, which were considered unsubstantiated by the Complaints Office. The Complaints Council endorsed the findings of the Complaints Office in 104 cases. The Committee is also concerned at the lack of information with regard to the outcome of the 47 complaints not endorsed by the Complaints Council (arts. 12, 13 and 16).

15. **Hong Kong, China should:**

(a) **Conduct an independent investigation into the allegations of excessive use of force by the police and anti-demonstrators during the so-called "umbrella" or "occupy" movement protest in 2014;**

(b) **Duly prosecute alleged perpetrators, including those officers who were complicit in those acts or allowed them to occur, and ensure that those found guilty are convicted and adequate penalties applied;**

(c) **Provide full redress to the victims, including fair and adequate compensation;**

(d) **Publicize the police general orders and related guidelines on the use of force and make sure that they are in compliance with international standards;**

(e) **Strengthen ongoing training for all law enforcement officers on the absolute prohibition of torture and on international standards on the use of force, as well as on their liability in the event of excessive use of force.**

Monitoring and inspection of places of detention

16. Noting the information provided by Hong Kong, China that Duty officers have been designated at each police detention facility for the day-to-day inspection of the conditions of detention, the Committee is concerned about the lack of information regarding the independence of their mandate and reporting obligations. As regards the Justices of Peace, appointed by the Chief Executive to visit correctional institutions, the Committee regrets the lack of information regarding the effectiveness of their recommendations. Hong Kong, China has also failed to provide information on the existing monitoring mechanisms within the facilities under the immigration department (arts. 11, 13 and 16).

17. **Hong Kong, China should empower the Justices of Peace to monitor and visit all places of detention or, alternatively, establish an independent body with the mandate to carry out effective unannounced visits at all places of detention under the police department, the correctional services department and the immigration department. The recommendations of such body should be made public in a timely and transparent manner and Hong Kong, China authorities should take action upon its findings.**

Solitary confinement and use of restraints

18. Notwithstanding the information provided by the delegation that the average duration of solitary confinement as a result of disciplinary proceedings was 7.45 days in 2014, the Committee remains concerned that this measure can be imposed up to a maximum of 28 days, according to Rule 63 (1) (b) of the Prison Rules. The Committee is also concerned that the measure of "removal from association with other detainees", contained in Rule 68B of the Prison Rules, can be imposed on vague grounds, such as "the maintenance of good order or discipline or in the interests of a prisoner", initially for a period of not more than 72 hours, and for a further period of not more than one month, which can be renewed every month without upper limit. As regards the use of mechanical restraints, the Committee regrets the lack of information provided on the types, average duration and frequency of their use, in spite of a specific request from the Committee (art. 16).

19. **Hong Kong, China should:**

(a) **Reduce the maximum duration of solitary confinement and limit its use as a measure of last resort, for as short a time as possible, under strict supervision and with the possibility of judicial review, in line with international standards. Hong Kong, China should establish clear and specific criteria in its regulations for decisions on solitary confinement, indicating the conduct, type and maximum duration;**

(b) **Prohibit the use of solitary confinement on persons with intellectual or psychosocial disabilities, juveniles, pregnant women, women with infants and breastfeeding mothers, in prison;**

(c) **Ensure that detainees' due process rights, such as the right to an independent hearing and to appeal, are respected when subjecting them to solitary confinement;**

(d) **Avoid the use of restraints as much as possible or apply them as a measure of last resort, when less intrusive alternatives for control have failed and for the shortest possible time;**

(e) **Compile and regularly publish comprehensive disaggregated data on the use of solitary confinement and restraints, including related suicide attempts and self-harm.**

Trafficking in persons and forced labour of domestic workers

20. While welcoming the amendment to the prosecution code to include forced labour within the definition of human trafficking (see para. 5 (d) above), the Committee notes with concern that there has been no parallel change in the legislative framework. In this regard, the Committee is concerned over numerous reports of cases of exploitation of migrant domestic workers. It regrets also that Hong Kong, China continues to maintain immigration policies that could contribute to the risk of forced labour, such as the "live-in requirement" in the employing household and the "two week rule", whereby domestic workers have to leave the territory within two weeks upon termination of their contracts. Notwithstanding

the possibility of granting immunity from prosecution to illegal immigrants who have been identified as victims of trafficking, the Committee is concerned that such possibility is subject to the discretion of the police department, the immigration department and the labour department, and that victims of trafficking or forced labour continue to be prosecuted for illegal stay (arts. 2, 12, 13, 14 and 16).

21. **Hong Kong, China should:**

(a) **Take the necessary legislative amendments to adopt the definition of trafficking provided for in the Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;**

(b) **Abolish the "two week rule" and allow live-out arrangements to prevent torture and ill-treatment of migrant domestic workers;**

(c) **Amend legislation to prohibit financial arrangements related to debt bondage with employment agencies and finance companies, eliminate the mandatory requirement of using employment agencies as intermediaries and reduce the excessive fees charged;**

(d) **Vigorously enforce the relevant legislative framework, carry out prompt, thorough, effective and impartial investigations and, in cases of prosecutions and convictions, punish trafficking and forced labour offenders, including officials and agencies involved, with appropriate penalties;**

(e) **Provide specialized training to those with front-line exposure to human trafficking on the identification of victims of trafficking, particularly women arrested for prostitution or immigration violations, and provide such victims with immediate rehabilitation and assistance;**

(f) **Provide an effective remedy to all victims of trafficking and forced labour and ensure they receive prompt and adequate psychological support, medical care, access to welfare benefits, adequate shelter and work permits, irrespective of their ability to cooperate in the legal proceedings against traffickers;**

(g) **Strengthen bilateral, regional and international cooperation to prevent trafficking and forced labour, particularly with those countries sending domestic migrant workers, to eradicate de facto debt-bondage contracts, aggressive loan agreements and excessive agency charges.**

Surrender of fugitive offenders and transfer of sentenced persons

22. The Committee notes the delegation's position that the negotiations with mainland China on arrangements for the surrender of fugitive offenders and the transfer of sentenced persons are a matter of internal affairs and that those arrangements could not be considered as extradition agreements that would fall under articles 3 or 8 of the Convention. The Committee considers, however, that Hong Kong, China is under an obligation to prevent transferred offenders or sentenced persons from being exposed to the risk of torture or ill-treatment while in detention or in prison upon return to mainland China or upon transfer via Macao, China (arts. 2 and 3).

23. **The Committee urges Hong Kong, China to ensure that any agreement on the surrender of offenders or transfer of sentenced persons from Hong Kong, China to mainland China or via Macao, China is in line with the obligations of the Convention and contains sufficient legal safeguards, appropriate judicial oversight mechanisms and effective post-return monitoring arrangements to protect fugitive offenders against torture or ill-treatment upon return or upon indirect transfer. Hong Kong,**

China should not transfer a fugitive to mainland China where there are substantial grounds to believe that he or she would be in danger of being subjected to torture or ill-treatment upon return or upon indirect transfer via Macao, China.

Training

24. While welcoming the efforts of Hong Kong, China to provide training on the Istanbul Protocol to health professionals and immigration officers (para. 5 (c) above), the Committee regrets the lack of information on the development of guidelines requiring its use in practice. The Committee also regrets the lack of data regarding the proportion of persons trained on the provisions of the Convention and on the prevention of torture (art. 10).

25. **Hong Kong, China should extend the training on the Istanbul Protocol to all officials involved in the treatment and custody of persons deprived of their liberty and develop guidelines or regulations requiring staff to use it in practice. Hong Kong, China should also ensure that the training on the provisions of the Convention and on the Istanbul Protocol is organized in a periodic and compulsory manner for all officials, is supported by guidelines for its implementation and that a methodology is developed for evaluating the effectiveness of such educational and training programmes.**

Redress and rehabilitation

26. The Committee regrets the lack of information on whether there is an enforceable legal right to rehabilitation and a concrete mechanism in place for providing such services to victims of torture (art. 14).

27. **The Committee, recalling its general comment No. 3 (2013) on the implementation of article 14 by States parties, urges Hong Kong, China to:**

(a) **Take the necessary legislative and administrative measures to guarantee that victims of torture and ill-treatment benefit from all forms of redress, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition;**

(b) **Fully assess the needs of torture victims and ensure that specialized, holistic rehabilitation services are available and promptly accessible without discrimination.**

Transgender and intersex persons

28. While welcoming the set-up of an interdepartmental working group on gender recognition (see para. 5 (e) above), the Committee is concerned about reports that transgender persons are required to have completed sex-reassignment surgery, which includes the removal of reproductive organs, sterilization and genital reconstruction, in order to obtain legal recognition of their gender identity. The Committee is also concerned that intersex children are subjected to unnecessary and irreversible surgery to determine their sex at an early stage. Furthermore, the Committee is concerned at the long-term physical and psychological suffering caused by such practices (arts. 10, 12, 14 and 16).

29. **Hong Kong, China should:**

(a) **Take the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilization;**

(b) Guarantee impartial counselling services for all intersex children and their parents, so as to inform them of the consequences of unnecessary and non-urgent surgery and other medical treatment to decide on the sex of the child and the possibility of postponing any decision on such treatment or surgery until the persons concerned can decide by themselves;

(c) Guarantee that full, free and informed consent is ensured in connection with medical and surgical treatments for intersex persons and that non-urgent, irreversible medical interventions are postponed until a child is sufficiently mature to participate in decision-making and give full, free and informed consent;

(d) Provide adequate redress for the physical and psychological suffering caused by such practices to some intersex persons.

Follow-up procedure

30. **The Committee requests Hong Kong, China to provide, by 9 December 2016, information on follow-up to the Committee's recommendations in paragraphs 7 (b), 9 and 13. In that context, Hong Kong, China is invited to inform the Committee about its plans for implementing, within the coming reporting period, some or all of the remaining recommendations in the concluding observations.**

Other issues

31. **Hong Kong, China is requested to disseminate widely the report submitted to the Committee and the present concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.**

32. **Hong Kong, China is invited to submit its next periodic report, which will be included in the sixth periodic report of China, by 9 December 2019.**